IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HAZARATVALI HAZARATKHAN PATHAN - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR MM TIRMIZI for Appellant(s) : 1,
MR KT DAVE APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 10/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal under the provisions of Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 13.12.1999 rendered in Sessions Case No.260 of 1996 by the learned Additional Sessions Judge (Court No.6), City Sessions Court, Ahmedabad. By the impugned order, the appellant ('the accused' for short) has been convicted of the offence punishable under Section 21 of the Narcotic Substances and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and also under Section 66 (b) of the Bombay Prohibition Act ('the Prohibition Act' for short) and sentenced to suffer RI for ten years and fine of Rs. 1 lac and in default of payment of fine, further RI for one year for commission of the offence punishable under Section 21 of the NDPS Act.

No separate sentence is imposed on the accused for commission of the offence punishable under Section 66 (b) of the Prohibition Act.

2. Briefly stated, the prosecution case as disclosed in the FIR and unfolded during trial is as under:

2.1. On 16.7.1996, at about 12.05 P.M., RK Parasiya, PSI, who was on his duty in Gomtipur Police Station of the City of Ahmedabad, received a secret information from an informant that a person named Hazratvali Hazratkhan Pathan, resident of Sakra Ghanchi's Chawl, was to come from Zulta Minara and to proceed towards his residence with certain quantity of brown sugar in his possssion. On receiving such information, the first information was reduced into writing in station diary by him after intimating his higher officials about the said information.

Panchas were called upon and necessary arrangements were made to trap the accused in presence of panchas. During the raid, the accused was found coming from Zulta Minara. On identification of the accused, he was stopped and on his search, 12 grams and 440 ml. grm. brown sugar was recovered from his custody and possession. A person was called upon to weigh the material recovered from the accused and FSL expert was also called upon for primary test of the material seized from the accused. The FSL expert, on primary test, opined that the material was brown sugar and, therefore, the accused was arrested.

2.2. A complaint in respect of the aforesaid incident was lodged by P.W.8, RK Parasiya, PSI of Gomtipur Police station, Ahmedabad City against the accused for commission of the offence punishable under section 21 of the NDPS Act and Section 66 (b)

of the Prohibition Act. The accused was arrested and the muddamal was seized. The accused and the seized muddamal both were entrusted to the PSO, Gomtipur Police station and investigation was started by him. During the course of investigation, he recorded statement of the police personnel and thereafter on receipt of the report from the FSL testifying that the said muddamal article was brown sugar, the accused was charge-sheeted for commission of the offence under Section 21 of the NDPS Act and also under section 66 (b) of the Prohibition Act, in the Court of the learned Metropolitan Magistrate, Ahmedabad City.

2.3. As the offence under the NDPS Act is exclusively triable by a Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad committed the case to the City Sessions Court, Ahmedabad.

2.4. The learned Additional Sessions Judge (Court No.6), City Sessions Court, Ahmedabad to whom the case was made over for trial, framed the charge against the accused for commission of the offence under section 21 of the NDPS Act and also under Section 66 (b) of the Prohibition Act which was read over and explained to him. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Sessions Case No.260 of 1996.

2.5. To prove the culpability of the accused, the prosecution has examined the following eight witnesses and relied upon their oral testimony:

P.W.No	Name	Ex.No
P.W.1	Vijraj Jawanmal (Goldsmith)	8
P.W.2	Dilipbhai Ramanlal, panch witness	14

P.W.No	Name	Ex.No
P.W.3	Mahendrasinh Jagbahadursinh, panch witness	15
P.W.4	Gambhirbhai Jethabhai, Head Constable	17
P.W.5	Gulam Mayodin Abbasmiya, Police Constable	22
P.W.6	Ranjitsinh Prithvisinh, Head Constable	25
P.W.7	Vasudev Pranshankar, Head Constable	29
P.W.8	Raijibhai Koyabhai Prasiya	30

2.6. To prove the charge levelled against the accused, the prosecution has also produced the following documentary evidence and relied upon the contents of the same, which are enumerated in para 5 of the impugned judgment and order:

S.No	Description	Ex.No
1.	Police complaint	31
2.	Reports made to PSO	20&32
3.	Panchnama	16
4.	Yadi calling upon FSL expert	33
5.	FSL dispatch note	27
6.	FSL receipt	26
7.	FSL report	34

S.No	Description	Ex.No
8.	Seizure memo	21
9.	FIR recorded in station diary	18
10.	Registration of crime in station diary	19
11.	Entry made in Anamati register	23& 24

2.7. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under section 313 of the Code. In his further statement, he denied the case of the prosecution in toto and stated that he has been falsely implicated in the case. However, he did not produce any evidence nor did he examine any witness in support of his defence.

2.8. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court has held that the

prosecution has proved its case against the accused beyond reasonable doubt and held the accused guilty for commission of the offence punishable under Section 21 of the NDPS Act and under Section 66 (b) of the Prohibition Act. On the aforesaid finding, the trial court convicted the accused for commission of the said offences and imposed sentence on him to which reference is made in earlier paragraph of this judgment. It is this judgment and order of conviction and sentence which is on the anvil of scrutiny before this court in this appeal at the instance of the accused.

3. Mr. Tirmizi, learned advocate of the accused, has contended that the accused was not given option of being searched in presence of Executive Magistrate or a Gazetted Officer. The accused was given the option of being searched before a gazetted officer but the option of being searched before the

magistrate, which is a mandatory provision under the NDPS Act, was not given to the accused. It is emphatically submitted by him that there is variance in the place from where the accused was apprehended. It is emphasized by him that the provisions of Section 42 of the NDPS Act have not been complied with and, therefore, the accused is entitled to get the benefit of non-compliance of provisions of Section 42 (2) of the NDPS Act. It is also high-lighted by him that the complainant and the investigating officer is the same person and, therefore, no reliance can be placed on the evidence of P.W.8, RK Parasiya, Ex.30, who has lodged the complaint as well as investigated the case.

3.1. On the aforesaid premises, he submitted that the impugned judgment and order deserves to be quashed and set aside by allowing this appeal and thereby acquitting

the accused of the offence with which he was charged. He, therefore, urged to allow this appeal.

4. Per contra, Mr. KT Dave, learned APP has submitted that there is voluminous evidence on record which would establish the guilt of the accused beyond reasonable doubt. The provisions contained under the NDPS Act have been duly complied with. According to him, the provisions of Section 43 of the NDPS Act would be attracted to this case and not Section 42 of the NDPS Act and, therefore, the information received by the complainant was not required to be reduced into writing and there was no requirement of sending the said secret information to higher officials. Notwithstanding the same, the said information was reduced into writing by P.W.8 and also forwarded to his higher officials. Therefore, provisions of Section 42 (1) and (2) have

been duly complied with. It is also emphasized by him that the accused was given option by P.W.8 as PSI is not a gazetted officer. The accused did not exercise the option and agreed to be searched by the complainant and, therefore, PW 8 in presence of panchas searched the accused. Therefore, the provisions of section 50 have been complied with. There is no room of doubt in the evidence of the prosecution witnesses and complicity of the accused is duly established by the evidence on record and the trial court has rightly come to the conclusion that the charge against the accused has been duly proved and he has been held guilty for the said offences. It is submitted by him that the trial court has rightly convicted the accused for commission of the offence punishable under section 21 of the NDPS Act and rightly sentenced him as the sentence of RI for ten years and fine of Rs. 1 lakh is the minimum

sentence for commission of the offence under punishable under section 21 of the NDPS Act.

4.1. On aforesaid premises, it is submitted by him that the impugned judgment and order does not call for any interference of this court and the appeal lacks merit and, therefore, he urged to dismiss the appeal.

5. This court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this Court has examined the

entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made

by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit

language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Officer during the course of search of the accused and seizure of the muddamal, contraband article, brown sugar and the trial court has considered the evidence in proper perspective and rightly recorded the order of conviction and sentence.

9. In this connection, we shall first refer to the oral testimony of P.W.8, RK Parasiya, Ex.30 at page 77 of the paper book. It is, inter alia, testified by him that he was working as PSI in Surveillance Squad at Gomtipur police Station. On close and careful scrutiny of his evidence, it is evident that he was on duty on 16.7.1996 in Gomtipur Police Station. At about 12.05 P.M. he received a secret information that a person named Hazratvali Hazaratkhan Pathan, resident of Sakra Ghanchi's Chawl was to come from Zulta Minara and to proceed towards his residence with certain quantity of brown sugar in his custody and possession. On receiving such information he informed his higher official about the same and made an entry of to that effect in the station diary. It is further testified by him that he asked the accused as to whether he would like to be searched by a

gazetted officer or a magistrate but the accused said that he does not want to be searched by any of them and the accused may be searched by him. He, therefore, searched the accused in presence of the panchas and during the search, brown sugar weighing 12 grams and 440 ml.grams was found from him. He withstood the test of cross-examination and nothing substantial has been brought out during the course of his cross-examination which would even remotely suggest that he has not complied with the provisions of Sections 42 (1) or (2) as well as 50 of the NDPS Act. The complaint which is filed by him is on record at Ex.31. A perusal of the said complaint reveals that he has received secret information to the effect that one person named Hazratvali Hazratkhan Pathan, resident of Sakra Ghanchi's Chawl was to come from Zulta Minara and to proceed towards his residence with certain quantity of brown sugar in his custody and possssion and,

therefore, he informed his higher officials about the said information and made an entry in the station diary regrading receipt of said information. A copy of the said station diary is on record at Ex.18. A perusal of the same clearly shows that he has recorded the said information in the station diary and he also conveyed the said information to his higher official. Therefore provisions of Section 42 of the NDPS Act have been complied with.

10. A perusal of the complaint Ex.31 reveals that he had given option to the accused and inquired with him as to whether he wants to be searched in presence of a gazetted officer or a magistrate and if he so desires, necessary arrangement for procuring their presence can be made. He has stated that the accused did not opt to be searched in presence of a gazetted officer or a magistrate and told him that he may search him and, therefore, he

searched him in presence of the panchas and hence provisions of Section 50 of the NDPS Act have also been duly complied with. According to this court, the evidence of P.W.8, R.K. Parasiya, is trustworthy and reliance can be placed upon his oral testimony to connect the accused with the charge levelled against him.

11. To corroborate his evidence, the prosecution has also relied upon the evidence of P.W.4, Gambhirbhai Jethabhai, Head Constable, Ex.17, P.W.5, Gulam Mayodin Abbasmiya, Police Constable, Ex.22, P.W.6, Ranjitsinh Prithvisinh, Head constable Ex.25 and P.W.7, Vasudev Pranshanker, Head Constable, Ex.29. A close scrutiny of the evidence of the aforesaid witnesses unequivocally suggest that they have taken part in the raid. P.W.4, Gambhirbhai Jethabhai, Head Constable, Ex.17 has produced the original station diary of the police

station. In the said station diary at Entry No.16, page 63, the said secret information has been reduced into writing which is in the handwriting of P.W.8, RK Parasiya. The complaint was registered and thereafter investigation was taken over by P.w.8, RK Parasiya. P.W.5, Gulam Mayodin Abbasmiya, Police constable, Ex.22 has testified that he brought original Anamati register with him. On page 63, entry No.227 is an entry relating to receipt of muddamal in sealed condition. He has stated that the muddamal in sealed condition was handed over by PSO Gambhirbhai to Crime Writer Head Deepsinh Virsinh and there is entry in the Anamati Register with regard to handing over of muddamal in sealed condition. P.W.6, Ranjitsinh Prithvisinh, Head Constable, Ex.25 has testified that he took the muddamal from police station to FSL. P.W.7, Vasudev Pranshanker, Head Constable, Ex.29 has testified that secret information

received by P.W.8 was recorded in the station diary and it was also conveyed to his higher officials. Entry to the said effect was also made in the station diary and thereafter service of two panchas was requisitioned and trap was arranged.

12. The evidence of the afore-said witnesses clearly reveal that the secret information received by P.W.8 was reduced into writing, the said information was conveyed to his higher officials and an entry with regard to the receipt of the secret information and also regarding conveying of the said secret information to his higher official was recorded in the station diary.

13. From the evidence of the aforesaid witnesses it is clear that the provisions of Section 42 (1) and (2) have been fully complied with. From their evidence it is

also established that provisions of Section 50 of the NDPS Act have also been complied with.

14. The prosecution has thereafter relied upon the evidence of Panch witnesses to prove the complicity of the accused with the crime. So far as the evidence of P.W.2, Dilipbhai Ramanlal, Panch witness Ex.14 is concerned, he has turned hostile and, therefore, it is not necessary to discuss his evidence in detail. P.W.3, Mahendrasinh Jagbahadursinh, panch witness, Ex.15 has supported the prosecution case and has stated before the court with regard to the contents of the panchnama and also about the raid carried out in compliance of the provisions of Section 50 of the NDPS Act. He has successfully withstood the test of cross-examination and nothing substantial which could be of any help to the accused has been brought out.

15. The prosecution has also examined P.W.1, Vijayraj Jawanmal, a gold smith, at Ex.8, who has weighed the muddamal and from his evidence it is clear that the said muddamal was weighing 12 grams and 440 ml.gram.

16. On over all appreciation of the prosecution evidence, following points can be culled out:

(i) P.W.8, RK Parasiya, PSI received secret information on 16.7.1996 which he had conveyed to his higher officials and the said information was also reduced into writing in the station diary.

(ii) During search of the accused, contraband article was seized. FSL expert was called and on primary test he opined that the

substance seized from the accused was brown sugar and, therefore, P.W.1, Vijayraj Jawanmal, a goldsmith, was called for weighing the substance and on weighing it, it was found that the substance was weighing 12 grams and 440 ml.grams.

(iii) FSL report produced at Ex.34, in terms certified that the contraband article contained morphine, codeine, acetyl codein, non-acteyl morphine, dye-acetyl morphine (heroin) thebine, papbarin and narcotics. The muddamal was sealed. From the oral testimony of P.W.3 Mahendrasinh Jagbahadursinh, a panch witness, Ex.15, police complaint Ex.31, Panchnama Ex.16 as well as oral testimony of the witnesses, it is duly proved that provisions of Section 42 (1) and (2) and 50 of the NDPS Act have been duly complied with. The oral testimony of the witnesses as well as the entry made in the station diary duly proved

that the provisions of Sections 42 (1) (2) and 50 of the NDPS Act have been duly complied with. The evidence on record reveals that the muddamal which was sealed during the panchnama remained in tact till it was handed over to the FSL authority.

17. In view of the aforesaid evidence, there is no manner of doubt that when the accused was intercepted, apprehended and searched, he was found to be in possession of contraband article brown sugar. Necessary formalities of search and seizure were made in presence of panchas and complied with the requirements and observed all the formalities contained under the NDPS Act, samples were sent to FSL after following the procedures under the NDPS Act.

18. On close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of

conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court as according to us, no other conclusion is possible except the one reached by the trial court on the facts and in the circumstances of the case.

19. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

20. In aforesaid view of the matter, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction ands sentence. The sentence awarded to the accused is the minimum and it has to be maintained.

21. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial court and hence this appeal lacks merit and deserves to be dismissed.

22. For the foregoing reasons, the appeal fails and accordingly it is rejected.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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